85-611

No.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ORVILLE E. MCQUAY, *et al.*,
Petitioners,

v.

CITY OF JUNCTION CITY, KANSAS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

CHARLES S. SCOTT

SCOTT, SCOTT, SCOTT & SCOTT
724½ Kansas Avenue
Topeka, Kansas 66603
(913) 233-0514

Attorney for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the dismissal of Petitioner's substantial federal claim before trial deprived the United States District Court of its pendent jurisdiction over Petitioner's non-federal claim.

2. Whether the United States District Court erred in dismissing Petitioner's complaint on the basis that it failed to state a claim upon which relief may be granted pursuant to 42 U.S.C. § 1983.

PARTIES INVOLVED

Plaintiffs Below:

Orville E. McQuay and Ruth McQuay, His Wife, Individually and Mac's Restaurant, Inc., A Corporation.

Defendants Below:

City of Junction City, Kansas, A Municipal Corporation, and Its City Commissioners, David R. Platt, Larry Plaggerman, Eunice L. Lesser, James A. Smothers and Josephine Youmkins; John F. Higgins; Dr. Ronald D. Mace and Carl Wunder.

Pending appeal in the United States Court of Appeals for the Tenth Circuit, pursuant to a settlement agreement between Petitioner and all Co-Defendants excepting Ronald D. Mace and Carl Wunder, the appeal was dismissed.

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REFERENCE TO REPORTS OF OPINIONS

The opinion of the Court of Appeals for the Tenth Circuit, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the District of Kansas also appears in the Appendix.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 11, 1985. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVED

The Fourteenth Amendment to the United States Constitution states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

This action was filed in the United States District Court for the District of Kansas on January 12, 1981, pursuant to 28 U.S.C. §§ 1331 and 1343 seeking redress for the denial of property rights protected under the Fourteenth Amendment to the United States Constitution and further redress pursuant to 42 U.S.C. §§ 1983 and 1985. Thereafter, on behalf of all Defendants, motions to dismiss the complaint were filed. The United States District Court for the District of Kansas by memorandum and order dated April 9, 1982,

granted said motions. From the other granting said motions to dismiss, Petitioner timely filed his notice of appeal to the United States Court of Appeals for the Tenth Circuit. Thereafter, on July 11, 1985, the United States Court of Appeals for the Tenth Circuit rendered its order and judgment affirming the decision of the United States District Court for the District of Kansas.

Pending the appeal of this matter in the United States Court of Appeals for the Tenth Circuit, pursuant to a settlement agreement between Petitioner and Defendants City of Junction City, Kansas and its Commissioners, a joint motion was filed to dismiss the appeal which was sustained by the United States Court of Appeals for the Tenth Circuit and accordingly was dismissed on January 26, 1984. This left the appeal pending against the two (2) Defendants Mace and Wunder.

The complaint herein contains three (3) counts. The first part of the complaint identifies the Defendants alleging their official titles and their respective duties. Count I proceeds to allege a cause of action pursuant to 42 U.S.C. § 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Essentially, the substance of the allegations hereunder seek to show that the Petitioner was the owner and operator of a restaurant and sought to seek a zoning change as early as October, 1979, by submitting his formal application to the City Commissioners, the governing body of the City of Junction City, Kansas. A zoning change was necessary in order for the Petitioner to convert his restaurant to a supper club which would have permitted him to sell liquor by the drink under

the Alcoholic Beverage Control laws of the State of Kansas. The complaint goes on to allege he made numerous applications to the City Commissioners and the Planning Commission to amend the existing ordinance which would have permitted the Petitioner to apply for what is referred to as a conditional use permit which would have permitted him to establish his supper club. Each and every time that Petitioner's application came up for consideration either by the City Commissioners or the Planning Commission, for some reason or the other he was directed to refile. This process went on for over a year. The allegations go on to charge that the actions and the conduct of the City Commissioners and individual members thereof deprived the Petitioner of his enjoyment to his constitutional property rights as protected under the Fourteenth Amendment to the United States Constitution and that the City Commission and individual members thereof were acting under color of law, ordinance and custom.

Count II seeks to allege a conspiracy against each of the Defendants pursuant to 42 U.S.C. § 1985(3). At this time, the Petitioner is abandoning his conspiracy claim.

Count III, after re-alleging all the facts and circumstances contained under Counts I and II, alleges that Wunder and Mace committed acts of libel and slander at a meeting on October 9, 1980, before the Planning Commission. In an effort to oppose Petitioner's last application to amend the zoning changes, these two (2) Defendants, while acting in their official capacities, made false statements which were derogatory and defaming to the Petitioner. On the next day, the text of the letter written by Mace and the remarks

made by Wunder were published in the local newspaper. This Count, which we incorporated by reference the facts and circumstances of the first Count, demonstrates that Mace and Wunder were acting under color of law and ordinance along with the City Commission and the members thereof, all constituted a violation of Petitioner's rights under the United States Constitution. Additionally, this Count contains allegations supporting Petitioner's pendent claim sounding in slander and libel.

Thereafter all Defendants filed their respective motions to dismiss and on April 9, 1982, the United States District Court for the District of Kansas sustained all motions to dismiss. With respect to Mace and Wunder, the basis of the Court's decision was that the complaint failed to state a claim on which relief may be granted. He goes on further to hold that Petitioner cannot recover on his pendent claim.

Thereafter Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. Pending the appeal before the United States Court of Appeals for the Tenth Circuit, the Petitioner, the City of Junction City and its Commissioners reached a settlement agreement. Thereafter said parties filed a motion to dismiss the appeal which was by the Appeals Court granted on January 26, 1984. On July 11, 1985, the order and judgment of the United States Court of Appeals for the Tenth Circuit affirmed the decision of the United States District Court for the District of Kansas.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Tenth Circuit affirming the decision of the United States District Court for the District of Kansas

was in effect in conflict with applicable decisions with this Court and departed from the accepted course of judicial proceedings.

ARGUMENT AND AUTHORITIES

1. Whether the Dismissal of Petitioner's Substantial Federal Claim Before Trial Deprived the United States District Court of Its Pendent Jurisdiction Over Petitioner's Non-Federal Claim

It has been held time and time again that an adverse adjudication of a federal claim does not automatically deprive a federal court of its pendent jurisdiction. This is true notwithstanding that the United States Court of Appeals relied upon *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715 (1966). Commencing as far back as *Siler* v. *Lewisville & N.R. Co.,* 213 U.S. 1975 (1909) and *Penn Mutual Life Ins. Co.* v. *Austin,* 968 U.S. 685 (1898), held to the affect that a federal court may upon deciding the federal question adversely to the party raising it, nonetheless can go on to decide non-federal questions presented. Then in later cases by this Court in *Armstrong Paint & Varnish Works* v. *Nu Enamel Corp.,* 305 U.S. 315 (1938) was to the effect that an adverse decision of the federal claim did not deprive the federal court of its pendent jurisdiction. Subsequent to the renditions in the Supreme Court, there have been cases in the several circuits both in the Court of Appeals and the District Courts adhering to the same views. First Circuit: *Strachman* v. *Palmer,* 177 F.2d 427 (1949); *Blanchard & Co.* v. *Gilman & Son, Inc.,* 353 F.2d 400 (1965); Second Circuit: *Travel Magazine, Inc.* v. *Travel Digest, Inc.,* 191 F. Supp. 830 (D.C. N.Y. 1961); Third Circuit: *Cromwell* v. *Hillsboro Twp.,* 149 F.2d 617 (1945), aff'd 326 U.S.

620; *American Securit Co.* v. *Shatterproof Glass Corp.*, 166 F.Supp. 813 (D.C. Del. 1958), aff'd 268 F.2d 769, cert. den. 361 U.S. 902; Fifth Circuit: *Jacobs* v. *North Louisiana & Gulf R. Co.*, 69 F.Supp. 5 (D.C. La., 1946); Seventh Circuit: *Georgia* v. *Wenger*, 187 F.2d 285 (C.A. 7 Ill., 1951), cert. den. 342 U.S. 822; Ninth Circuit: *Wham-O-Mfg. Co.* v. *Paradise Mfg. Co.*, 327 F.2d 748 (C.A. 9 Cal., 1964); *Sunbeam Lighting Co.* v. *Pacific Associated Lighting, Inc.*, 328 F.2d 300 (C.A. 9 Cal., 1964).

Contrary decisions for different reasons have been expressed in recent years. *St. John* v. *Justman*, —— F.2d ——, No. 84-2323 (10th Cir. 1985); *Fariss* v. *Lynchburg Foundry*, 769 F.2d 958 (4th Cir. 1985); *Shahwy* v. *Harrison*, 755 F.2d 1432 (11th Cir. 1985); *Litchfield* v. *Spielberg*, 736 F.2d 1352 (9th Cir. 1984); *L.A. Draper & Son* v. *Wheelabrator-Frye Inc.*, 735 F.2d 414 (5th Cir. 1984); *Daley* v. *Town of New Durham*, 733 F.2d 4 (1st Cir. 1984); *Kapaun* v. *Dziedzic*, 674 F.2d 737 (8th Cir. 1982); *U.S.* v. *Kember*, 685 F.2d 451 (3rd Cir. 1982); *McLearn* v. *Cowen & Co.*, 660 F.2d 845 (2nd Cir. 1981).

As here, which will be discussed below, Petitioner complied with the following criteria that has been determined by the many court decisions: (1) The "jurisdictional or federal claim" must have substance sufficient to confer jurisdiction of the subject matter on the court; (2) The relationship between the claim and the "nonjurisdictional" or "state claim" must be so intertwined as to present one "case"; (3) Judicial economy, convenience and fairness to the litigants should be present to justify the court's exercise of jurisdiction.

We submit that Petitioner has stated a federal claim with substance to confer jurisdiction of the subject matter, i.e., pursuant to 42 U.S.C. § 1983 and under the United States Constitution. Count III setting forth the non-jurisdictional claim of slander and libel appears to be intertwined with the allegations that Mace and Wunder made the false statements to the Planning Commission in opposition to the granting of Petitioner's application for the conditional use permit. There is no question that economy, convenience and fairness is present in this case which was brought to avoid piecemeal litigation. As it was express in *Gibbs, supra,* it is evident that pendent state law claims are not always or even almost always to be dismissed and not adjudicated. See *Guyette* v. *Stauffer Chemical Co.,* 519 F.Supp. 521 (D.C. N.J. 1981).

It should be kept in mind notwithstanding that the district court dismissed Petitioner's federal claim, this claim was amicably settled between the Petitioner, the City of Junction City and its Commissioners which resulted in dismissing the appeal against them. Accordingly, the amicable settlement in a practical sense would take precedence over the district court's order of dismissal.

2. Whether the United States District Court Erred in Dismissing Petitioner's Complaint on the Basis That It Failed To State a Claim Upon Which Relief May Be Granted Pursuant to 42 U.S.C. § 1983.

Both the District Court and the Court of Appeals mistakenly interpreted the allegations of Petitioner's complaint. A reasonable and just interpretation would certainly reach the inescapable conclusion that Petitioner has sufficiently stated a claim under 42 U.S.C.

§ 1983 according to *Gomez* v. *Toledo,* 445 U.S. 635 (1980). This Court held that only two (2) requirements must be met to plead an action under § 1983. (1) That some person deprived another of a federal right; and (2) That such person acted under color of state or territorial law.

Here, those allegations appear in the complaint. Throughout the entire complaint, it is unequivocally alleged that each of the Defendants were acting under color of state law and ordinance at the time they committed the alleged constitutional acts against this Petitioner. Moreover, the same allegations in Count I were re-alleged and incorporated in Count III which indicates that Mace and Wunder participated in the unconstitutional activity of depriving Petitioner his property rights protected under the Fourteenth Amendment. Accordingly, a federal claim is properly stated and alleged in accordance with the requirements set forth in *Gomez, supra.*

CONCLUSION

Petitioner respectfully submits that sufficient reasons are stated that a federal question herein is in conflict with applicable decisions of this Court and for a further reason that diversed rulings among the circuits and would warrant this Court to assume jurisdiction for this matter to be heard on its merits. We respectfully submit that both the District Court and the Court of Appeals erred in refusing to retain pendent jurisdiction notwithstanding that the federal claim had been disposed of either by dismissal or by settlement.

Respectfully submitted,

CHARLES S. SCOTT

SCOTT, SCOTT, SCOTT & SCOTT
724½ Kansas Avenue
Topeka, Kansas 66603
(913) 233-0514

Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1689

(D.C. No. 81-4012)
(D. Kansas)

ORVILLE E. McQUAY and RUTH McQUAY, his wife, individually, and MAC'S RESTAURANT, INC., a corporation,

Plaintiffs-Appellants,

v.

DR. RONALD D. MACE AND CARL WUNDER,

Defendants-Appellees.

ORDER AND JUDGMENT

[Filed July 11, 1985. Howard K. Phillips, Clerk]
Before McKAY, BREITENSTEIN AND MOORE, Circuit Judges.

This is a civil rights action against the City of Junction City, Kansas, the city commissioners, the city manager, and Mace, a health officer, and Wunder, a sanitarian. The district court granted a summary judgment in favor of all defendants. The plaintiffs-appellants appealed. In this court the appellants and all the defendants, except Mace and Wunder, filed a motion to dismiss the appeal stating that the issues presented by the appeal have been "amicably settled." The motion was granted on January 26, 1984. This left the appeal pending so far as defendants Mace and Wunder are concerned. We affirm.

On an appeal from the grant of a motion to dismiss for failure to state a claim on which relief may be granted, we accept as true the factual allegations in plaintiffs' complaint and make all reasonable inferences in favor of plaintiffs. Mitchell v. King, 10 Cir., 537 F.2d 385, 386. We uphold the district court's ruling only if it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims entitling them to relief. McLain v. Real Estate Board of New Orleans, 444 U.S. 232, 246.

Plaintiffs own and operate a restaurant in Junction City, Kansas. R. 1-2. In the fall of 1979, they attempted to convert their restaurant to a supper club which sold alcoholic beverages for consumption on plaintiffs' property. R. 3. The restaurant was located in a zoning area which did not permit the sale and consumption of alcoholic beverages on its premises. To make the conversion, it was necessary to amend the existing zoning ordinance or to obtain a conditional use permit. Plaintiffs filed petitions with the City Planning Commission and the City Commissioners to grant their requests. The City Commission considered the plaintiffs' petition at its October 29, 1980, meeting. A motion to deny the petition was made and defeated. The City Commission then voted to table the request and instructed plaintiffs to file another petition with the City Planning Commission.

Plaintiffs filed this suit on January 12, 1981. Count I of the complaint charges that the plaintiffs were denied the use and enjoyment of their property in violation of the due process and equal protection provisions of the Fourteenth Amendment and of 42 U.S.C. § 1983. Count I does not mention Mace and Wunder except to identify them by name as city officials. "Personal participation is an essential allegation in a § 1983 claim." Bennett v. Passic, 10 Cir., 545 F.2d 1260, 1262-1263. Count I was properly dismissed against Mace and Wunder for failure to state a claim on which relief may be granted.

Count II of the complaint alleges that the Secretary of the City Planning Commission, City Commission and City Manager conspired to deprive plaintiffs of due process and equal protection in violation of 42 U.S.C. § 1985 (2) and (3). The Supreme Court has held that in order to bring a § 1985 (3) action, "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102. Actions based on the portion of § 1985 (2) following the semicolon must also be supported by allegations of racial or class based invidious discrimination. Lessman v. McCormick, 10 Cir., 591 F.2d 605, 608; Smith v. Yellow Freight System, Inc., 10 Cir., 536 F.2d 1320, 1323.

Plaintiffs do not allege any racial or class-based discrimination. As the district court said, "the complaint does not reveal any subjective motivation behind the conspiracy." R. 47. Plaintiffs have not alleged that they are members of a class of persons against whom the conspirators' discriminatory animus was directed or that the conspiracy was aimed at plaintiffs because of their membership in that class. Lessman, supra 591 at 608. The court properly dismissed Count II against Mace and Wunder for failure to state a claim for which relief may be granted.

Count III alleges that at a Planning Commission meeting on October 9, 1980, Wunder, in his capacity as sanitarian, opposed plaintiffs' petition and maliciously and falsely said, (1) plaintiffs had stopped up the grease trap in the cooking area of their restaurant, (2) the trash receptacles in the women's rest room lacked proper covers, and (3) the plaintiffs had disregarded directives of the Health Department to clean up the discrepancies. R. 10. Count III also alleges that Dr. Mace, acting in his capacity as health officer, forwarded a letter to the Chairman of the Planning Commission stating his opposition because of repeated violations of sanitation requirements by plaintiffs. R. at 11. Plaintiffs allege that Dr. Mace's statements were false.

Plaintiffs say that Wunder's and Mace's statements were slanderous, libelous and violated the Fourteenth Amendment and § 1983. They sought both actual and punitive damages.

Defamation is not sufficient alone to support a § 1983 claim, but must be accompanied by some other tangible interest. Paul v. Davis, 424 U.S. 693, 701, 706, 711; McGhee v. Draper, 10 Cir., 639 F.2d 639, 642-643. Defamation alone is in the province of the state and may be protected against by state law. Paul, supra, 424 U.S. at 712. Plaintiffs do not allege in their complaint that the statements of Mace and Wunder affected the outcome of their efforts to amend the ordinance to permit conditional use. The district court correctly held that plaintiffs failed to allege a claim for which relief could be granted in Count III.

Plaintiffs argue that the district court should have exercised pendent jurisdiction and heard their claim in Count III. "[I]f the federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726. Counts I and II, dismissed prior to trial, cannot be used as a basis for pendent jurisdiction over Count III. Additionally, plaintiffs moved in this court to dismiss their appeal as to all defendants except Mace and Wunder stating that their difficulties had been "amicably resolved." They may not now assert pendent jurisdiction.

Affirmed.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 81-4012

ORVILLE E. MCQUAY & RUTH MCQUAY, His Wife, Individually, and MAC'S RESTAURANT, INC., a corporation,
Plaintiff,

vs.

CITY OF JUNCTION CITY, KANSAS, A Municipal Corporation, & ITS CITY COMMISSIONERS, DAVID R. PLATT, LARRY PLAGGERMAN, EUNICE L. LESSER, JAMES A. SMOTHERS & JOSEPHINE YOUNKIN; JOHN F. HIGGINS; DR. RONALD D. MACE and CARL WUNDER, *Defendants*.

MEMORANDUM AND ORDER

[Filed April 9, 1983. Arthur C. Johnson, Clerk]

This case is before the court on the defendants Mace and Wunder's motion to dismiss. Before ruling on this motion, the court will summarize the plaintiffs' three count complaint. In doing so, the court will treat the allegations as true and will not dismiss the complaint unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 246 (1980).

The plaintiffs own and operate a restaurant in Junction City, Kansas. They desired to turn their restaurant into a supper club at which alcoholic beverages could be served. To ob ain a private club license, the plaintiffs were required to obtain a zoning certificate from the city. Because their location was zoned CSR, a classification which did not

permit the sale of alcoholic beverages, they chose to seek an amendment to the zoning code, which would allow a conditional use permit. An earlier application for a rezoning had failed to gain approval by the planning commission due to lack of a quorum.

On March 4, 1980, the plaintiffs filed their petition to amend CSR zoning to allow conditional use permits. The planning commission recommended the proposed amendment, and it came before the city commission on April 1, 1980. The city commission tabled it for further study and, a week later, returned it to the planning commission to eliminate what certain city commissioners feared was illegal spot zoning. On May 8, 1980, the planning commission again recommended the amendment, with certain restrictions, to the city commission. On May 27, 1980, a motion to adopt or deny the amendment was made, but it failed for want of a second. On September 2, 1980, the city attorney advised the city commissioners that the earlier action on the motion constituted a final decision of denial. The city commissioners suggested that the plaintiffs might file a second petition with the planning commission.

The next day, the plaintiffs filed their second petition. On October 9, 1980, the planning commission considered the amendment and adopted it by a tie vote, one member abstaining. It was submitted to the city commission without recommendation. At the October 9 meeting, defendants Mace and Wunder reported that the plaintiffs' restaurant was in violation of the city's sanitation code in several aspects. The plaintiffs claim that these reports were false. The reports are mentioned in an article in the Junction City Daily Union attached to the complaint. On October 28, 1980, the city commission considered the petition. A motion to deny the petition was defeated, and the petition was tabled. The plaintiffs were advised to file a third petition with the planning commission.

In their first count, the plaintiffs claim that the above conduct denied them the use and enjoyment of their property without due process of law and also denied them the equal protection of the laws. In the second count, the plaintiffs allege that the defendants conspired to accomplish the denials of the constitutional rights alleged in the first count. In the third count, the plaintiffs allege that the allegedly false reports of Mace and Wunder damaged the plaintiffs' business, good name, and reputation in violation of 42 U.S.C. § 1983. The plaintiffs seek $100,000 damages as the proximate result of their injury, a sum considerably less than sought in either of the first two counts. We further observe that the plaintiffs have not named the members of the planning commission as defendants, and we do not find any allegation of tortious conduct or other wrongdoing on the part of the planning commission. Although he has not been served, Clarence E. Freeman, the building inspector for Junction City, is referred to as a defendant in paragraph 23 of Count I and paragraph 3 of Count II.

Neither the plaintiffs nor the defendants have argued as to whether Count I should be dismissed as to defendants Wunder and Mace. Count I does not mention either of them except to identify them as city officials. For liability under Section 1983, some form of personal participation must be alleged. *Bennett v. Passic*, 545 F.2d 1260, 1262-1263 (10th Cir. 1976). We find no such allegation; in fact, it is unclear whether the plaintiff even intends for Mace and Wunder to be liable for the supposed 1983 violation alleged in Count I. In any event, this court does not find any 1983 cause of action alleged against defendants Mace and Wunder in Count I nor in the incorporation of those allegations into Count III. This resolution means that Count I cannot be the basis for an exercise of pendent jurisdiction over Count III. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

I

The plaintiffs, in their second count, reallege the 1985(2) and 1985(3) claims set forth in the first count. They claim that the defendants conspired to impede, hinder, obstruct or defeat the due course of justice with intent to deprive the plaintiffs of equal protection and due process of laws. They allege certain overt acts contained in the first count of the complaint; none of these acts involve the federal courts. Most deal with procedural hurdles allegedly set up by the defendants to hinder the plaintiffs' zoning amendment.

In discussing a 1985(3) cause of action, the Supreme Court concluded that one requirement is an allegation of racial or otherwise class-based, invidiously discriminatory animus. *Griffin v. Breckenridge,* 403 U.S. 88, 102-103 (1971). Although the Supreme Court did not consider whether that sort of discriminatory animus was essential to a 1985(2) claim, both paragraphs of 42 U.S.C. § 1985 were originally contained in Section 2 of the Ku Klux Klan Act and both contain the phrase "with intent to deny any citizen the equal protection of the laws." It was from that phrase that the Supreme Court held such animus was a necessary element of a 1985(3) claim. *Id.* In considering actions based on the portion of 1985(2) after the semicolon (conspiracy to obstruct state court proceedings), numerous courts including this court have required allegations of racial or otherwise class-based invidiously discriminatory animus to survive a motion to dismiss. *Brawer v. Horowitz,* 535 F.2d 830, 840 (3rd Cir. 1976); *Kimble v. D.J. McDuffy, Inc.,* 648 F.2d 340, 347 (5th Cir. 1981); *Williams v. St. Joseph Hospital,* 629 F.2d 448 (7th Cir. 1980); *Smith v. Yellow Freight System, Inc.,* 536 F.2d 1320, 1323 (10th Cir. 1976); *Phillips v. Fisher,* 445 F.Supp. 552, 555 (D. Kan. 1977). Accordingly, we require an allegation of racial or otherwise class-based, invidiously discriminatory animus to overcome a motion to dismiss a 1985(2) claim such as this one involving state courts, instead of federal courts.

The plaintiffs nowhere allege that the claimed discrimination was based on race or any other suspect class. In fact, the complaint does not reveal any subjective motivation behind the alleged conspiracy. We are unable to assume that the alleged conspiracy was motivated by a racial or otherwise class-based, invidiously discriminatory animus, and therefore we must dismiss count II as to defendants Mace and Wunder.

II

The third count alleges that defendants Mace and Wunder made defamatory statements about the plaintiffs and the sanitation in the plaintiffs' restaurant. These statements allegedly violated the Fourteenth Amendment although the complaint does not say how. The complaint does state that the defendants Mace and Wunder intended thereby to injure the plaintiffs' business, good name, and reputation.

It is well established that defamation does not generate a cause of action under Section 1983 because the right to be free of defamation and to secure redress for its infliction is within the province of state law and is not an incident of federal citizenship. *See Paul v. Davis,* 424 U.S. 693, 712 (1976); *McGhee v. Draper,* 639 F.2d 639 (10th Cir. 1981); *Taylor v. Nichols,* 409 F.Supp. 927, 934 (D.Kan. 1976). In order to justify relief under the liberty clause of the Fourteenth Amendment via Section 1983, the plaintiffs' alleged reputational damage must be entangled with some other tangible interest such as employment. *McGhee v. Draper, supra,* 639 F.2d at 643.

The plaintiffs have not alleged that the statements of Mace and Wunder were a factor in their continuing effort to get a zoning exception of some sort for their property. The reports were made to the planning commission, not to the city commission, and the newspaper article contains statements to the effect that the planning commission con-

sidered the sanitation code violations irrelevant in determining whether conditional use permits should be generally allowed. As noted earlier, the plaintiffs allege no wrongdoing on the part of the planning commission. We think it is too large an assumption for this court to assume that the statements of Mace and Wunder reached the city commission and persuaded those commissioners to deny the plaintiffs' petition and proposed amendment. Furthermore, there is some question as to whether a denial of a zoning change is a deprivation of property; thus we cannot say any deprivation of a constitutionally secured property interest accompanied the alleged defamation. *See Mosher v. Beirne,* 357 F.2d 638 (8th Cir. 1966); *Molgaard v. Town of Caledonia,* 527 F.Supp. 1073 (E.D. Wisc. 1981).

We have found only a few cases in which the plaintiffs were able to recover in a civil rights action for defamation. In *McGhee v. Draper, supra,* the Tenth Circuit concluded a hearing was necessary to determine the accuracy of the alleged defamatory statements when the defamation accompanied the discharge of the plaintiff. In *Cox v. Northern Virginia Transportation Commission,* 551 F.2d 555 (4th Cir. 1976), an employee was discharged under a cloud of financial scandal. The court said that the employee was entitled to a hearing to clear her name. The federal tort there was not the defamation but the denial of the hearing and opportunity to refute the public charges. 551 F.2d at 558. In such a case, the plaintiff cannot recover punitive or compensatory damages; the relief is in the form of a hearing. 551 F.2d at 559. *See also, Slegeski v. Ilg,* 395 F. Supp. 1253, 1258 (D. Conn. 1975). Finally, in *Marrero v. City of Hialeah,* 625 F.2d 499 (5th Cir. 1980) *cert denied,* 650 U.S. 913 (1981) the Fifth Circuit concluded that damage to reputation, where reputation is a part of a business' good will, states a 1983 cause of action under Florida law which treats good will as property generally. The court in *Marrero* reads *Paul v. Davis, supra,* as not requiring the

defamation to cause some other constitutional deprivation, but the defamation must occur with, and be reasonably related to, the alteration of the right or interest. 625 F.2d at 518-519.

We have not been directed to any Kansas law that treats good will as a constitutionally protected property interest.[1] Furthermore, the approach of the *Marrero* court could easily treat any defamation of a business as a 1983 cause of action. This seems to disregard the clear impact of *Paul v. Davis, supra. See Becker v. Russek,* 518 F.Supp. 1040 (W.D. Va. 1981). We conclude that the defamation alleged herein does not constitute a 1983 cause of action. *Cf., Sorenson v. Zapien,* 455 F.Supp. 1207 (D. Colo. 1978); *Privitera v. Town of Phelps,* 79 App.Div.2d 1, 435 N.Y.S.2d 402, 406-407 (1981) (slander intended to prevent the sale of plaintiff's real estate did not constitute a 1983 cause of action).

Accordingly, we grant the motion to dismiss filed by Mace and Wunder.

IT IS SO ORDERED.

Dated this 9th day of April, 1982, at Topeka, Kansas.

/s/ Richard D. Rogers
United States District Judge

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[1] We acknowledge, however, that under Kansas tort law good will is property. *Avery v. City of Lyons,* 183 Kan. 611, 331 P.2d 906, 914 (1958).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Case No. 83-1689

ORVILLE E. McQUAY & RUTH McQUAY his wife, Individually, and MAC'S RESTAURANT, INC., A Corporation,
Appellants

vs.

CITY OF JUNCTION CITY, KANSAS, *et al.*,
Appellees

JOINT MOTION

COMES NOW the Appellants, Orville E. McQuay and Ruth McQuay, his wife, Individually, and Mac's Restaurant, Inc., a Corporation, the Appellants herein by and through their attorney, Charles S. Scott, and the following named Appellees, The City of Junction City, Kansas, a Municipal Corporation, and its City Commissioners, David R. Platt, Larry Plaggerman, Eunice L. Lesser, James A. Smothers, and Josephine Younkin, and the City Manager, John F. Higgins, by and through their attorney, Richard A. Pinaire, and these parties jointly move the Court through an Order dismissing the Appeal of the Appellants with respect to the Appellees named in this Joint Motion.

In support, the undersigned attorneys hereby advise the Court that the parties named in this Motion have amicably resolved the issues involving these parties to this Appeal pursuant to the terms of a Release Agreement executed on the —— day of January, 1984 between such parties, and, as a result, the parties to this Joint Motion hereby request that the Court enter an Order of Dismissal with respect to

the Appellants' Appeal concerning the Appellees named in this Joint Motion, with prejudice.

The undersigned, Charles S. Scott, on behalf of the Appellants, hereby advises the Court, that upon entry of the requested Order of Dismissal relating to the Appeal with respect to the Appellees named in this Joint Motion that there would still remain pending the Appeal of the Appellants with respect to the remaining Appellees in the case, Dr. Ronald D. Mace and Carl Wunder.

APPROVED:

SCOTT, SCOTT, SCOTT & SCOTT
724½ Kansas Avenue
Topeka, Kansas 66603

Attorneys for Appellants

By /s/ CHARLES S. SCOTT, SR.
Charles S. Scott, Sr.

HOOVER, SCHERMERHORN EDWARDS & PINAIRE
811 North Washington Street
Junction City, Kansas 66441
(913) 238-3126

Attorneys for Appellees, City of Junction City, Kansas, David R. Platt, Larry Plaggerman, Eunice L. Lesser, James A. Smothers, Josephine Younkin, and John F. Higgns

By _____
Richard A. Pinaire

CERTIFICATE OF SERVICE

TO: Mr. Walter P. Robertson
859 South Washington Street
Junction City, Kansas 66441
Attorney for Dr. Ronald D. Mace and Carl Wunder

We hereby certify that on the —— day of January, 1984, we served a true and correct copy of the foregoing Joint Motion upon Walter P. Robertson, attorney of record for Appellees, by mailing a copy of the same to him by first-class mail, postage prepaid, at the address designated above.

/s/ CHARLES S. SCOTT, SR.
Charles S. Scott, Sr.

Richard A. Pinaire

APPENDIX D

NOVEMBER TERM — January 26, 1984

Before Honorable Monroe G. McKay and Honorable Stephanie K. Seymour, Circuit Judges

No. 83-1689

ORVILLE E. MC QUAY & RUTH MC QUAY, his wife, individually and MAC'S RESTAURANT, INC., a corporation,
Plaintiffs-Appellants,

vs.

CITY OF JUNCTION CITY, KANSAS, a municipal corporation, & ITS CITY COMMISSIONERS, DAVID R. PLATT, LARRY PLAGGERMAN, EUNICE L. LESSER, JAMES A. SMOTHERS & JOSEPHINE YOUNKIN; JOHN F. HIGGINS; DR. RONALD D. MACE & CARL WUNDER, *Defendants-Appellees.*

This matter comes on for consideration of a joint motion of appellants and certain appellees, namely, the City of Junction City, Kansas, David R. Platt, Larry Plaggerman, Eunice L. Lesser, James A. Smothers, and Josephine Yonkin, City Commissioners, and John F. Higgins, City Manager, to dismiss the appeal in the captioned case as to the names appellees.

Upon consideration whereof, the motion is granted. The appeal is dismissed as to those appellees who are parties to the joint motion to dismiss.

It is further ordered that the appeal shall continue as to all other appellees.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 81-4012

ORVILLE E. McQUAY & RUTH McQUAY, His Wife, Individually, and MAC'S RESTAURANT, INC., A Corporation,
Plaintiffs

vs

CITY OF JUNCTION CITY, KANSAS, A Municipal Corporation, & ITS CITY COMMISSIONERS DAVID R. PLATT, LARRY PLAGGERMAN, EUNICE L. LESSER, JAMES A. SMOTHERS & JOSEPHINE YOUNKIN; JOHN F. HIGGINS; DR. RONALD D. MACE and CARL WUNDER, *Defendants*

COMPLAINT

[Filed January 12, 1981. Arthur C. Johnson, Clerk]

COMES NOW Orville E. McQuay and Ruth McQuay, his wife, individually, and Mac's Restaurant, Inc., a corporation, and for their respective causes of action against the above named Defendants, and each of them, states and alleges:

1. That the Plaintiffs, Orville E. McQuay and Ruth McQuay, his wife, are citizens of the United States of America and residents of Junction City, Geary County, Kansas, with their correct post office address at 239 East Third Street; Mac's Restaurant, Inc. is a Kansas corporation duly established and operating pursuant to corporate laws of the State of Kansas with its principal place of business located at 723 South Washington Street, Junction City, Geary County, Kansas.

2. The Defendant, City of Junction City, Kansas, is a municipal corporation and a political subdivision duly organized and existing under the laws of the State of Kansas located in Geary County, Kansas. It is authorized by statute to enact ordinances and to transact business affairs through its City Commissioners. That David R. Platt is Mayor and a member of the City Commission of the City of Junction City, Kansas; other members are the Defendants Larry Plaggerman, Eunice L. Lesser, James A. Smothers and Josephine Younkin.

3. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1343; the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1983 and 1985. The claims herein are for an amount in excess of $10,000 exclusive of interest and cost.

4. At all times hereinafter set forth, the Plaintiffs, Orville E. McQuay, and Ruth McQuay, his wife, were the sole stockholders and possessed with the controling interest of the Plaintiff, Mac's Restaurant, Inc. Also, at all times hereinafter set forth Orville E. McQuay and Ruth McQuay, his wife, were the owners and in possession of the real property located at 723 South Washington, Junction City, Kansas, where the restaurant is located, and were serving as the managers and operators of Mac's Restaurant, Inc.

5. At all times hereinafter set forth, there was duly created, organized and existing under the laws of the State of Kansas and under City Ordinance of the Defendant, City of Junction City, the Junction City-Geary County Metropolitan Planning Commission (hereinafter referred to as Planning Commission).

At all times hereinafter set forth, the City Commission is authorized by Kansas statute and ordinance of the City of Junction City to enact and to amend city ordinances and regulations relating to establishing zoning for land and/or property use within the corporate limits of the City of Junction City.

6. At all times hereinafter set forth Clarence E. Freeman was the duly appointed and acting Building Inspector for the City of Junction City, Kansas, and also in that capacity served as the secretary for the Planning Commission.

7. At all times hereinafter set forth John F. Higgins was the duly appointed and acting City Manager for the City of Junction City, Kansas.

8. At all times hereinafter set forth, Dr. Ronald D. Mace was the duly appointed and acting health officer for the Junction City-Geary County Health Department.

9. At all times hereinafter set forth, Carl Wunder was the duly appointed and acting Sanitation Officer of the Junction City-Geary County Health Department.

10. At all times hereinafter set forth, the zoning regulations of the Defendant, City of Junction City, Kansas, made provisions for certain zoning areas. Inclusive therein provisions were made for commercial areas described as follows: Commercial Special (CS); Commercial General (CG); Commercial Central Special (CCS); and Commercial Service Restricted (CSR). Additional provisions were made for conditional use of real property in certain areas. With respect to the operation of private clubs, a conditional use of said real property was permitted in all the commercial zoning areas above mentioned with the exception of CSR. The Plaintiffs' restaurant was located in the CSR zoning area.

11. Sometimes during the Fall of 1979, Plaintiffs made a decision to expand and to convert their restaurant operation to that of a supper club which would permit the sale and consumption of alcoholic beverages on the premises as authorized by the Alcoholic Beverage Control Laws of the State of Kansas. During the same period, Plaintiffs proceeded to draft and prepare plans for expansion of the restaurant facility and arrangements were also made to obtain financing for the supper club project. It was dis-

covered that the zoning location of the restaurant, i.e., CSR, was not zoned for an establishment which would permit the sale and consumption of alcoholic beverages and either a rezoning would be necessary or an amendment to the existing zoning ordinance was necessary to provide for a conditional use permit.

12. In order to secure the appropriate private club license to operate a supper club, one of the pre-requisites was to secure a zoning certificate from the municipality for the purpose of verifying the location was properly zoned for such an establishment to operate.

13. As early as October, 1979, Plaintiffs commenced the cumbersome journey in the legal process of either effecting a zoning change or to effect an amendment to the existing ordinance which would place Plaintiffs in a position to apply for a conditional use permit to establish and operate a supper club at its present location. In the pursuit of this task, Plaintiffs retained legal counsel, after which numerous exchanges of correspondence and telephone conversations were conducted between Plaintiffs' attorney and the Building Inspector, Freeman, and the City Manager, Higgins.

14. Thereupon, the Plaintiffs filed a peition with the Defendant City Commission to amend the CSR Zoning to include a conditional use permit provision. At the Defendant City Commission's meeting on March 4, 1980, the minutes reflect that the Plaintiffs had withdrawn their request to rezone the property from zone CSR to Zone CS. The purposed amendment was submitted for the first reading and was approved.

15. As a result of the numerous communications and being advised by either or both Freeman and Higgins, the best way to proceed was to secure an amendment to the existing CSR ordinance to provide for a conditional use permit.

16. Plaintiffs filed their first application for rezoning as provided by law with the Planning Commission. At its meeting on February 14, 1980, the motion to approve the application was denied for lack of a quorum vote.

17. Thereafter Plaintifss submitted their petition to the Planning Commission to amend the City zoning regulations of changing the subject area from CSR with a provision for a conditional use permit. At its meeting on March 13, 1980, the request to amend with several restrictions was adopted with recommendations to the Defendant City Commission to amend said ordinance.

18. Thereupon the recommendations of the Planning Commission to amend the existing regulations relating to the zoning CSR subject to a number of restrictions was submitted to the Defendant City Commission at its meeting on April 1, 1980. At this meeting there were no protests filed or any voiced. Thereafter, the Defendant City Commissioners voted to table the request for one (1) week for further study.

19. Then, at the Defendant City Commission's meeting on April 8, 1980, the matter was once again brought before the City Commissioners. During the course of this meeting, the Defendant Higgins expressed his opinion and renewed his previous recommendations to deny the request to amend the subject regulation on the basis that the proposal was a mere subterfuge of spot zoning restrictions. Based upon the recommendations of the Defendant Higgins and pursuant to other discussions, it was voted to refer the proposed amendment back to the Planning Commission for the purpose of considering the proposed restrictions.

20. Once again, on May 8, 1980, at a regular meeting of the Planning Commission, the proposed amendment with restrictions was submitted to the members present for consideration. After much discussion, the proposed amendment with restrictions was adopted with recommendations to the Defendant City Commission for their approval.

21. Then on May 27, 1980, at the regular monthly meeting of the Defendant City Commission, the proposed recommendations to amend the subject regulation from the Planning Commission came on for consideration. Notwithstanding that it was unnecessary for a motion to adopt or deny said recommendation, one was made but it lacked a second. No further action was taken on the recommendation at this meeting.

22. At the regular monthly meeting of the Defendant City Commission on September 2, 1980, the proposed amendment was once again submitted for consideration. In support of the proposed amendment a petition labeled "Protest Petition" containing a number of signatures supporting the approval of the recommendation of the Planning Commission to amend the subject zoning regulation was filed. During the course of discussion, the city attorney advised the Commissioners that it was without jurisdiction in that the rezoning would necessarily have to be referred back to the Planning Commission. Additionally, a parlimentary question was raised as to whether the motion made for adoption lacking a second at its May 27, 1980, meeting constituted final action and was tantamount to a denial of the motion. After recessing for the purpose of consulting with the city attorney, the Defendant Mayor Platt, ruled that the action taken by the Defendant City Commission on May 27, 1980, was final. It was also mentioned at the meeting by Plaintiff McQuay that he had secured a financial commitment to finance the expansion of his premises but it was contingent upon the Defendant City Commission approving the amendment to the existing zoning regulation providing for a conditional use which would permit the Plaintiffs to operate a supper club. But notwithstanding, the Plaintiff McQuay was advised to refile another petition with the Planning Commission.

23. On or about September 3, 1980, the Plaintiff McQuay filed another petition with the Planning Commission with

specific instructions to the Defendant Freeman to include the same identical restrictions that were included in the previous petition filed with the Planning Commission. For some reason or another, the Defendant Freeman omitted to include or incorporate by reference those restrictions and the petition was thereby submitted without the restrictions. It was not ascertained that these restrictions were omitted until such time that the petition was formally submitted to the Planning Commission at its regular monthly meeting on October 9, 1980. At this meeting, the Plaintiff Orville McQuay appeared in person with his attorney and it was mentioned that the second petition now before the Planning Commission was to include the same restrictions that previously had been submitted with the original petition. After much discussion, this petition was adopted and was to be submitted to the Defendant City Commission without recommendations.

24. Then on October 28, 1980, at the regular monthly meeting of the Defendant City Commission, Plaintiffs second petition came on regularly for consideration. After much discussion, which followed with a recess for approximately fifteen (15) minutes, the Defendant City Commissioners conferred with their attorney and staff members in executive session. Thereafter, a motion was first made to deny the request. This motion was defeated. Thereafter, the Defendant City Commissioners adopted a motion to table the request and instructed the Plaintiffs once again to file their petition with the Planning Commission with restrictions included.

25. Commencing as far back as October, 1979, each and all of the acts of the Defendants alleged herein were by the Defendants and each of them, individually and under the color and pretense of the statutes of the State of Kansas, the ordinances and regulations of the Defendant City of Junction City, Kansas, and under the authority of their respective positions, i.e., a municipal corporation, city com-

missioners, building inspector and city manager. During this time span, these Defendants acted arbitrarily and capriciously in an unlawful and unconstitutional fashion without any valid land use reasons or clear cut criteria justifying their actions. As a result of these actions, it denied to these Plaintiffs their rights to the enjoyment and rightful use of their property by their failure to act rationally and properly by subjecting the Plaintiffs to the unnecessary and burdensome treatment as described above. The course of conduct of these Defendants, and each of them, was of a harassing nature. Moreover, the course of conduct was unheard of. Accordingly, the Plaintiffs were denied their rights, privileges and immunities secured by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, in addition to being denied due process of law as protected under the Fourteenth Amendment to the United States Constitution and those rights and immunities under 42 U.S.C. § 1983.

COUNT II

Plaintiffs complaint against the above named Defendants and for a second cause of action states and allege:

1. Plaintiffs re-allege all pertinent paragraphs contained in their first cause of action against the Defendants and incorporate the same herein which has in effect denied the Plaintiffs the lawful and constitutional right to the use of their property.

2. Defendants above described arbitrarily and unconstitutionally harassed and frustrated the Plaintiffs by refusing to act properly and legally on their legal request to amend zoning regulations which has arbitrarily denied to these Plaintiffs their rights secured under the due process clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

3. During the time span hereinabove alleged, the Defendant City Commissioners collectively and individually acted on behalf of the Defendant City of Junction City, Kansas, and acting in concert with the Defendants Freeman and Higgins, who were acting individually and in their official capacities in violation of 42 U.S.C. § 1985(2) did conspire and agree between themselves and perhaps with others, the identity of whom these Plaintiffs are unable to state, for the design purpose of impeding, hindering, obstructing or defeating the due course of justice and with intent to deny to these Plaintiffs the equal protection of the laws and to due process of the law. And further, to injure these Plaintiffs in their lawful attempt to obtain the rights under the Constitution and the laws of the United States to the equal protection of the laws.

4. In furtherance of the object of said conspiracy, the said Defendants did or cause to be done the pertinent acts and followed a course of conduct all of which is set forth in Plaintiff's Cause of Action No. I, and in violation of 42 U.S.C. § 1985(3) which would thereby deprive these Plaintiffs to the full enjoyment and the rights to their property as guaranteed under the Constitution and laws of the United States and even the Bill of Rights and the laws of the State of Kansas.

5. As a direct and proximate cause of the unconstitutional and unawful conduct of these Defendants, and each of them, the Plaintiff have suffered damages, inclusive of but not limited thereto, to loss of projected profits in their business, the loss of a loan commitment to secure financing for the expansion of Plaintiff's property and the loss of the benefits of its enhanced value; expenditure of money for attorney fees and the cost of processing of the several unnecessary petitions filed with the Planning Commiaaion and the City Commission, all to their damage in the sum of $850,000. Plaintiffs have experienced severe mental anguish and suffering and have been held out to public ridi-

cule as a result of the wide-spread publicity given to the number of unprecedemted proceedings hereinabove set forth, all to their damage in the sum of $50,000. Additionally, the Defendants, acting in their respective official capacities and individually, acted maliciously, willfully and with the intent to degrade and harm the Plaintiffs and the Plaintiffs are entitled to punitive damages in the sum of $50,000.

WHEREFORE, Plaintiffs pray the Court for damages in a total sum of $950,000, an allowance of reasonable attorney fees for Plaintiffs attorney, the cost of this action and such other relief as the Court may deem just and proper.

COUNT III

Plaintiffs for their Count No. III against the two (2) named Defendants Dr. Ronald Mace and Carl Wunder reallege all pertinent paragraphs hereinabove set forth and incorporate the same herein as part of their Count No. III.

1. At the meeting on October 9, 1980, of the Planning Commission when Plaintiffs' last petition to amend the zoning regulation was formally presented and discussed, the Defendant Carl Wunder, in his official capacity as Sanitarian for the Junction City-Geary County Health Department, and acting under color of statute and ordinance, appeared in opposition to granting the petition to amend the existing zoning regulation. In support of his opposition, he maliciously made statements which were false that the Plaintiffs had stopped up grease trap in the cooking area of the restaurant, no proper covers on the trash receptacles in the womens' restroom and the owners continually disregarded the directives to clear up the discrepancies noted by the Health Department.

2. In addition, the Defendant Dr. Ronald D. Mace, acting in his official capacity as Health Officer and under color of

state law and ordinance for the Junction City-Geary County Health Department, forwarded a letter to the Chairman of the Planning Commission dated October 9, 1980, a copy of which is hereto attached and made a part hereof, which is marked Exhibit "A". The substance of said letter was also in opposition to the granting of the petition to amend the zoning regulations which in substance stated that it had been brought to the attention of Defendant Mace of the repeated violations of sanitation requirements of Mac's Restaurant and thereupon requested the Planning Commission consider denying their request to the amendment to the zoning regulation. That said statements contained in said letter were malicious and falsely made.

3. That the above utterance made by Defendant Wunder and the statements contained in Defendant Mace's letter were made and presented notwithstanding the Plaintiffs had, at all times, passed inspections with respect to sanitary conditions with a high score, which were conducted by the Defendant Wunder from time to time.

4. That both the oral statements by the Defendant Wunder and the letter dated October 9, 1980, by Defendant Mace were presented in open meeting of the Planning Commission with other persons present and the following day the statements of Wunder and the mention of the letter dated October 9, 1980, were widely published in the daily newspaper, THE DAILY UNION, the only local daily newspaper that is circulated widely in the Junction City area. A copy of the newspaper article is attached hereto and made a part hereof, which is identified as Exhibit "B".

5. That the said utterances by the Defendant Wunder and the forwarding of the letter dated October 8, 1980, by the Defendant Mace were wilfully and maliciously published with the intent to injure Plaintiffs' business and good name and the reputation that it enjoyed in the operation of a restaurant and that such matter published was false, slanderous and libeous.

6. That said publication and the use of said slanderous and libeous matter in the context in which it was utilized constituted a violation of Plaintiffs' constitutional rights as protected under the Fourteenth Amendment to the United States Constitution and their rights protected under 42 U.S.C. § 1983.

7. As a direct and proximate result, Plaintiffs have suffered actual damages in a total sum of $100,000. That because of the willfulness, wantonness and maliciousness by these Defendants, the Plaintiffs are entitled to the sum of $50,000 in punitive damages.

WHEREFORE Plaintiffs pray the Court for damages in a total sum of $1,100,000, an allowance of reasonable attorney fees for Plaintiffs attorney, the cost of this action and such other relief as the Court may deem just and proper.

SCOTT, SCOTT, SCOTT & SCOTT

By: /s/ CHARLES S. SCOTT
Charles S. Scott
724½ Kansas Avenue
Topeka, Kansas 66603
(913) 233-0514

Attorney for Plaintiffs

Plaintiffs demand trial by jury.

EXHIBIT A

JUNCTION CITY - GEARY COUNTY
HEALTH DEPARTMENT

Postoffice Box 282 119 East 9th Street

Junction City, Kansas 66441

Telephone 913 238-4711 913 762-5788

October 9, 1980

Chairman
Metropolitan Planning Commission
Junction City-Geary County
Junction City, KS 66441

Dear Sir

During our regular monthly Board of Health Meeting October 9, 1980, it was brought to my attention of the repeated violations of sanitation requirements for restaurant and drinking establishments in Junction City, Kansas, by Mac's Restaurant, 723 South Washington, owner and operator Orville McQuay.

I highly recommend at this time that the Metropolitan Planning Commission consider denial of a request by Orville McQuay for rezoning of 723 South Washington for construction of a supper club. I feel that the lack of cooperation from Mr. McQuay, in the operation of his present establishment, is reason enough to expect future problems if this operation is expanded.

Sincerely

/s/ Ronald D. Mace, M.D.
Ronald D. Mace, M.D., Health Officer
Junction City-Geary County Health Department

EXHIBIT B

The Daily Union, Junction City, Kansas

PLANNERS DUCK CLUB ISSUE; DENTAL CLINIC OK'D

10/10/80

By Carol Wright
Daily Union staff writer

Members of the Junction City-Geary County Metropolitan Planning Commission met Thursday evening in the city commission room of the Municipal Building to consider two controversial petitions.

The first question involved a public hearing on a request by Orville McQuay, owner of Mac's Restaurant, 723 S. Washington, to amend the city zoning regulations to include "restaurant-private clubs" as a conditional use in a commercial service restricted (CSR) district.

After prolonged debate by the public and planning commissioners, a vote was taken on the issue. It was a 3-3 tie with one abstention. Voting for conditional use were Ken Dunham, Wayne Lawson and Dan Moske. Voting against it were Art McKenna, Skip Killian and Tom Fegan. New commission member Sonny Ehm abstained.

The petition, according to Chairman Art McKenna Jr., will be put before city commissioners without a recommendation on Oct. 28 unless notifying planners about a different date.

Concerning the McQuay petition, Charles Scott, McQuay's legal advisor, said he thought there were "too many parliamentary problems with the city commission" because city commissioners referred the matter back to planning board members. Commissioner Tom Fegan agreed

with Scott by saying the city was "fooling around" with the McQuay petition.

"When you get right down to it," Fegan said, "the city was passing the buck."

Then a representative for the Junction City-Geary County Sanitation Committee informed board members about existing health problems within McQuay's restaurant. Several sanitary problems he brought up included plumbing troubles, a grease-coated stove and other unsanitary conditions which have not been corrected and occur "over and over."

McQuay quickly stepped up to the podium and addressed commissioners. He defended his business by pointing out that the so-called "problems" had been taken care of.

Fegan then told the board that the questions of sanitary conditions in McQuay's restaurant was a separate issue, not a part of what board members were trying to decide at the meeting.

"McQuay should appear before the health board and city commission," Fegan. "This (the sanitary conditions) has nothing to do with what we're discussing tonight."

Dan Moske, Zoning Board of Appeals chairman for Junction City-Geary County, reminded planners that even if the city commission grants McQuay operation of his restaurant-tavern in a CSR zone, McQuay also would have to seek approval by those on the zoning board of appeals to serve alcoholic beverages in his restaurant.

The second petition concerned a public hearing on a rezoning request by Dr. William Endicott, an Abilene dentist, to change a five-acre tract on St. Mary's Road from county residential suburban (RS) to city CSR.

On a 3-1 vote with one abstention, the board accepted the zone as requested regarding the front 2½ acres of Endi-

cott's proposed site, while allowing the back acre or tract to stand as is, as an RS zone.

McKenna stated that Endicott's petition will be sent back to the city commission for approval.

Bruce Collins, consulting engineer, and realtor Bob Wahle backed up Endicott's proposal to construct a well-organized treatment facility. Gary Sweet, Manhattan architect, brought along diagrams of the two lots or tracts, plus a color picture of the proposed dental clinic after construction. Sweet referred to the site as a "natural habitat."

"Because since it's out in the country, you'd want to do something to reflect that atmosphere," he said.

Endicott said he wants to construct a 12-chair dental clinic with approximately 4,000 square feet of floor space. He added that the clinic would employ 12 people. Of those 12, three would be dentists and the rest personnel.

Endicott reiterated that Junction City was in need of a dental facility which could care for a large percent of the people. As to the location of the clinic, Endicott thought highly of having a clinic on St. Mary's Road.

"People can park close enough, and (the building) would be accessible to the handicapped," he said. "I'd think I'd want a medical facility close by. It wouldn't operate on Sundays. There are two churches in that area that would have a lot of traffic on Sundays."

However, members of the First Christian Church and Highland Baptist Church weren't all that pleased about having a dental clinic near their area. Charles Chartier, representative of First Christian Church, protested by expressing his doubts about Endicott and his plans for the clinic.

"Members of our church are concerned. This picture," he said, motioning to the chart, "doesn't mean a thing. Don't be overwhelmed by pretty pictures."

A spokesman for Highland Baptist Church stated that he was quite impressed with what Endicott has done. The clinic, he pointed out, "is very tasteful in my opinion, but I do have a problem with (accepting) the amount of land he is requesting —— the whole five acres or 100,000 square feet of land."

Mrs. Endicott took the floor and was angered by the leery feelings expressed by Chartier about Endicott's actual intentions.

"We wouldn't have spent the money or have taken the time to have pictures of the clinic drawn up," Mrs. Endicott stated firmly, "if we weren't serious about building the clinic."

The third item on the agenda was postponed until the November meeting. That particular item was the consideration of the resident agent or owner of all property seeking commission action to appear before the panel at the time of presentation.

The meeting was adjourned at the appointed time.